(1)

Supreme Court, U.S.
FILED
APR 11 1996
OFFICE OF THE CLERK

No. 95-1640

IN THE

Supreme Court of the United States

October Term, 1995

MITSUKO ANDERSON,
CHARLES M. ANDERSON,

Petitioners

v.

DINESH C. SHARMA,
RUSHMI D. SHARMA.

On Petition for Writ of Certiorari
To The Virginia Supreme Court

PETITION FOR WRIT OF CERTIORARI

MITSUKO ANDERSON
CHARLES M. ANDERSON
Petitioners Pro Se
8401 Cathedral Forest Drive
Fairfax Station, Virginia 22039
(703) 643-2193

31 pp

Petitioner appealed a state trial court judgment to the Virginia Supreme Court which refused to hear said appeal due to stated one-day late filing.

The question presented for review is: was the stated late filing which caused dismissal of the Petitions for Appeal to the Virginia Supreme Court, based on timely first class mailing via the U.S. Post Office using a Certificate of Mailing as opposed to certified mailing as permitted by the Virginia Supreme Court Rule 5:5(b), excusable neglect.

The parties to this proceeding are:

MITSUKO ANDERSON
CHARLES M. ANDERSON
8401 Cathedral Forest Drive
Fairfax Station, Virginia 22039

DINESH C. SHARMA
17 Piney Glen Court
Potomac, Maryland 20854

RUSHMI D. SHARMA
11808 Old Drovers Way
Rockville, Maryland 20852

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JURISDICTIONAL STATEMENT

On November 20, 1995 the Supreme Court of Virginia dismissed Petitioners' Petitions for Appeal of Order entered July 25, 1995 for late filing. On January 19, 1996 the Supreme Court of Virginia then denied Petitioners' Petition for Rehearing of said dismissal resulting in state final denial of due process.

The jurisdiction of this Honorable Court is invoked pursuant to the provisions of 28 U.S.C. 1257(3), viz., a state court of last resort has decided an important federal question in a way that conflicts with the decisions of United States Courts of Appeals and this Honorable Court. Also U.S. Supreme Court Rule 10.b.

CONSTITUTIONAL PROVISIONS

Constitution of the United States

Article XIV, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal cases to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

VIRGINIA SUPREME COURT RULES

Rule 5:5. Extension of Time; Filing by Mail.

(a) The times prescribed for filing. . .a petition for appeal (Rules 5:17(a) and 5:21(g)) and a petition for rehearing (Rule 5:20 and 5:39), are mandatory.

(b) Any document required to be filled with the clerk of this Court, or filed in the office of the clerk of this Court, shall be deemed to be timely filed if it is mailed postage prepaid to the clerk of this Court by registered or certified mail and if the original receipt therefor be exhibited upon demand of the clerk of any party and it shows mailing within the prescribed time limits.

Rule 5:17. Petition for Appeal.

(a) Time for Filing.--In every case in which the appellate jurisdiction of this Court is invoked, a petition for appeal must be filed with the clerk of this Court:

(1) in the case of an appeal direct from a trial court, not more than three months after entry of the order appealed from; or. . .

STATEMENT OF THE CASE

Ruling was made (on trial of the case before a judge) on June 26, 1995 by Opinion Letter and judgment was entered by Order on July 25, 1995. Petitioner Charles M. Anderson filed three Appeal Petitions on behalf of himself and Petitioner Mitsuko Anderson and George J. Viertel, all in the same package using a United States Postal Service Certificate of Mailing (Appendix A-1), first-class, prepaid, in the United States Postal Service to the Virginia Supreme Court Clerk on October 24, 1995. The Virginia Supreme Court dismissed said Appeal Petitions for filing one-day late under Virginia Rule 5:17(a)(1) (three months), ignoring Petitioner's substitute filing by mail allowed under Virginia Rule 5:5(b) using a United States Post Office Certificate of Mailing, but not certified mailing as permitted but not mandated under Virginia Rule 5:5(b), which mailing, if accepted as to form of mailing, would have been one day early. Petitioners moved the Virginia Supreme Court to Rehear under Virginia Rule 5:20 (raising the due process federal question sought to be reviewed at page 2, paragraph 2 therein on November 28, 1995) which was denied on January 19, 1996. Petitioners filed this Writ of Certiorari appealing that January 19, 1996 denial.

ARGUMENT FOR ALLOWING WRIT

Whether Timely Filing of Appeal Petitions by First-Class, Postage Prepaid Mail Through the United States Postal Service (As A Substantial Equivalent To But Not Strictly That Permitted Under Rule), Which Clearly Demonstrated Mailing of Certain Documents By A Certain Party On A Certain Date And Which Receipt Of Said Documents Was Admitted By The Clerk Of Court, Though Physically One Day Late, Constitutes Excusable Neglect.

This Honorable Court in Pioneer Investment Services Co., v. Brunswick Associates Limited Partnership, et al, 507 U.S. 74, 123 L.Ed.2nd 74, 113 S.Ct. 1489 (1993) stated agreement with the factors identified by the Sixth Circuit Court of Appeals for balancing all the relevant circumstances surrounding a party's neglect in a late filing to determine if it constituted excusable neglect:

(1) The danger of prejudice to the opposing side,
(2) The length of the delay and its potential impact on judicial proceedings,
(3) The reason for the delay,
(4) Whether the delay was within the reasonable control of the one who delayed, and
(5) Whether the one who delayed acted in good faith.

Petitioners understand Pioneer to mean that the prior, inflexible test of whether the delay was within the control of the person who delayed has been modified to include four new factors which are to be equitably weighed considering the consequences of the delay in addition to the heretofore sole consideration of the reason for the delay. Thus inadvertence, mistake, carelessness, and even negligence could be

excused considering the equities under the circumstances surrounding the delay.

In this cause the reason is found in a good faith attempt to file the subject three Appeal Petitions (all common to the same case) by mailing on October 24, 1995 through the United States Postal Service by a Certificate of Mailing, first-class, postage prepaid, as opposed to a certified mailing as permitted by Virginia Rule 5:5(b). There was no actual delay of time on the court's calendar nor prejudice for the opposing party (he was mailed notice on February 20, 1996 of Petitioners' intent to file this Petition for Writ of Certiorari). The mailing by United States Postal Service Certificate of Mailing was physically received by the Clerk of the Virginia Supreme Court on October 26, 1995, technically by Rule (without consideration for date of mailing) one day late; however, even if it had been mailed by certified mail, the physical receipt by the Clerk would have been on the same date, viz., October 26, 1995. Precise, technical compliance with the Rule would not have resulted in any change in the date the Clerk received the mailing. The variance of the manner of mailing used from the manner permitted by the Rule is minuscule, a mere formality, and of no consequence as to time.

Petitioners substantially complied with the requirements of filing by mail under Virginia Rule 5:5(b), which does not dictate strict compliance with only certified or registered mail to the exclusion of other types of mailing accompanied by United States Post Office dated certification which provides the same proof. It is also noted that Virginia Rule 5:5(a) clearly states that the requirements therein for time of filing "are mandatory," while no such indication appears in Rule 5:5(b) for filing procedure by mail.

It is also noted that in this Honorable Court's October 1995 "Memorandum to Those Intending to Prepare a Petition for a Writ of Certiorari and Pay the $300 Docket Fee" this Honorable Court allows proof of date of mailing for filing of any petition sent "by first-class United States Postal Service, including express and priority mail, postage prepaid, and bearing a post-mark showing that the document was mailed on or before the last day for filing" (emphasis added) and further this Honorable Court emphasizes the requirement of the United States Postal Service over any private delivery or courier service. The reasoning for Virginia Rule 5:5(b), stating certified or registered mail, is not well founded. The Virginia Supreme Court ruled in Reese v. Wampler Foods, Inc., 222 Va. 249, 278 S.E.2d 870 (1981) that the purpose is "to protect a party from those delays which often occur in the regular dispatch of mail and naturally are outside a party's control." (emphasis added) But certified and registered mail are not faster than the regular dispatch of mail. Also certified and registered mail do not give the sender any more control than what he has over the regular dispatched mail. The point is not the amount of time in the United States Postal System but the proof of the date of mailing to show compliance with the mandate of Virginia Rule 17(a)(1), viz., three months from entry of the order. The purpose of dated mailing for Virginia filing is clearly the same as the purpose for filing a petition before this Honorable Court, i.e., to prove the date of mailing of the document, the date out of control of the mailer, and the date into the control of the United States Postal Service -- not a better or faster delivery. Also control, according to Pioneer, is no longer the inflexible standard; now there are four additional factors and equitable considerations of reason for and consequences of the delay. In this cause, the date of physical receipt of the package containing the subject three Appeal Petitions has never been in dispute by the Clerk of the Virginia Supreme Court; it is admitted as having been physically

received by them on October 26, 1995 (Appendix A-2). Actually Petitioners complied with the purpose further than this Honorable Court requires for proof of mailing date, viz., using a Certificate of Mailing from the United States Post Office and, when asked by the Virginia Supreme Court Clerk to present that proof, the presentation of the original was accepted by the Clerk for what it purported to be.

Thus the argument comes down to a balancing of the equities under the circumstances as to the reason and consequences. Although using certified mailing or a Certificate of Mailing was within the control of Petitioners, they erred by using a Certificate of Mailing upon the advice of Petitioner Mitsuko Anderson's counsel, Mr. George J. Viertel, who warned her to be sure to get a United States Post Office receipt of mailing and who failed to more carefully read Virginia Rule 5:5(b). He made an inadvertent and careless mistake of no physical consequence as to actual date of receipt by the Clerk of the Virginia Supreme Court and of no other consequence except as to Petitioners themselves. Petitioners' only justification for this inadvertence was their reliance on directions for mailing from counsel and having always received strong assurances over the years from the United States Postal Service that a United States Postal Certificate of Mailing was good anywhere as a receipt of mailing to prove the date of mailing.

Other circuits have followed the more flexible rule of Pioneer as to excusing neglect.

> A defense attorney in a suit under 42 U.S.C. §1983 was late in filing a post-trial bill of costs because he was on his honeymoon. LoSacco v. City of Middleton, 71 F.3d 33 (1995)

An appeal was filed late because of a legal assistant's error. U.S. v. Hooper, 43 F.3d 26 (1994)

Twenty-one personal injury plaintiffs filed late claims in a bankruptcy proceeding because they didn't receive notice of the bar date, even though they weren't entitled to notice. Chemetron Corp. v. Jones, No. 94-3371 (1995)

Bankruptcy claimants filed claims six to eight months late even though they received notice of the bar date. In Re Eagle Bus MFG. Inc., 62 F.3d 730 (1995)

A convicted drug-dealer filed a late appeal of a denial of a sentence reduction because he didn't receive notice of the denial. U.S. v. Montes, 65 F.3d 42 (1995)

An appeal was late because of "unsettled law" concerning whether an initial notice of appeal is nullified by an opposing party's motion for additional findings of fact. In Re Christopher, 35 F.3d 232 (1994)

A lawyer didn't answer a complaint because he wanted to save both parties money by pursuing a settlement. In Re Jones Truck Lines, Inc., 63 F.3d 685 (1995)

An appeal was filed late because the envelope was addressed incorrectly. Fink v. Union Central Life Insurance Co., 65 F.3d 722 (1995)

An appeal was late because it was sent to the wrong court. Arbuckle Wilderness V. Hagee, No. 94-6407 (1995)

A lawyer filed late answers on behalf of sex discrimination defendants because his original answers contained mistakes. Paris v. Mission Hills Bank, 60 F.3d 1486 (1995)

A notice of appeal in a civil case was late due to a lawyer's neglect. City of Chanute, Kansas v. Williams Natural Gas Co., 31 F.3d 1041 (1994)

A lawyer filed an appeal one business day late because he miscalculated the due date. Northwest Truck & Trailer Sales v. Dvorak. 877 P.2d 31 (1994)

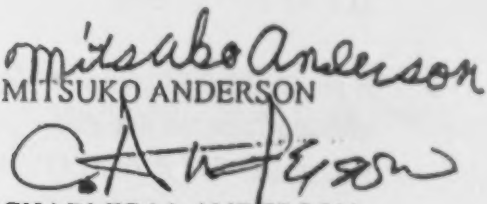
The assignments of error in the three Appeal Petitions before the Virginia Supreme Court are substantial and meritorious and of a most serious character and consequence reflecting on multiple court errors in fact and law which are clearly determinative of the issues. Dismissal of these three Appeal Petitions (all interrelated, common, and on appeal of the same judgment) under these circumstances constitutes wrongful denial of due process under the V and XIV Amendments of the United States Constitution and opportunity to be heard at all stages. Equity dictates that the three Appeal Petitions should be received by the Virginia Supreme Court, considering the nature of the assignments of error raised, the law and facts presented, and the clear record of multiple trial court findings, analyses, and rulings in direct and total conflict with the transcript record.

CONCLUSION

Thus Petitioners' neglect amounts to inadvertence, mistake, or carelessness, being in good faith and without delay or prejudice and of no adverse effect except as to themselves. Petitioners have shown good

cause for excuse of their neglect and therefore request that a writ of certiorari to the Virginia Supreme Court be granted and that the three interrelated and common appeal petitions filed by mail on October 24, 1995 in this cause be heard.

Respectfully submitted,



MITSUKO ANDERSON

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Fairfax Station, Virginia 22039
(703) 643-2193

APPENDIX

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U.S. POSTAL SERVICE **CERTIFICATE OF MAILING**

MAY BE USED FOR DOMESTIC AND INTERNATIONAL MAIL, DOES NOT PROVIDE FOR INSURANCE—POSTMASTER

Received From:

Chas Mitchell, George
9401 Cath'l Forest Dr.
Fairfax Station, VA 22039

One piece of ordinary mail addressed to:

Clerk - Supreme Court
100 N 9th St
Richmond Va 23219

PS Form 3817, Mar. 1989 GPO : 1993 O - 151-01

0000

U.S. POSTAGE
PAID
OCCOQUAN, VA
22125
OCT 24, '95
AMOUNT
$0.55
00022755-03

SUPREME COURT OF VIRGINIA
DAVID B. BEACH, CLERK
SUPREME COURT BUILDING
100 NORTH 9TH STREET, 4TH FLOOR
RICHMOND, VIRGINIA 23219
(804) 786-2251 V/TDD
FAX: (804) 371-8530

March 21, 1996

Mr. Charles M Anderson
8401 Cathedral Forest Drive
Fairfax Station,Virginia 22039

Re: Charles M. Anderson
v. Dinesh C. Sharma, et al.
Record No. 951908

George J. Viertel
v. Dinesh C. Sharma, et al.
Record No. 951909

Mitsuko Anderson
v. Dinesh C. Sharma, et al.
Record No. 951910

Dear Mr. Anderson:

Pursuant to our telephone conversation yesterday, please be advised that the petitions for appeal in each of the above-referenced cases were physically received in this office on October 26, 1995,

postage prepaid, first-class, via Certificate of Mailing.

Sincerely,

s\ Patricia H. Krueger
Patricia H. Krueger
Chief Deputy Clerk

PHK/kmw

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 20th *day of* November, 1995.

Charles M. Anderson, Appellant,

against Record No. 951908
Circuit Court No. CH125374

Dinesh C. Sharma, et al., Appellees.

For the Circuit Court of Fairfax County

Finding that the appeal was not perfected in the manner provided by law, the Court dismisses the petition for appeal filed in the above-styled case. Rule 5:17(a)(1).

A Copy,

Teste:

s\ David B. Beach
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 20th *day of* November, 1995.

Mitsuko Anderson, Appellant,

against Record No. 951910
Circuit Court No. CH125374

Dinesh C. Sharma, et al., Appellees.

For the Circuit Court of Fairfax County

Finding that the appeal was not perfected in the manner provided by law, the Court dismisses the petition for appeal filed in the above-styled case. Rule 5:17(a)(1).

A Copy,

Teste:

s\ David B. Beach
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 20th *day of* November, 1995.

George J. Viertel, Appellant,

against Record No. 951909
Circuit Court No. CH1235374

Dinesh C. Sharma, et al., Appellees.

For the Circuit Court of Fairfax County

Finding that the appeal was not perfected in the manner provided by law, the Court dismisses the petition for appeal filed in the above-styled case. Rule 5:17(a)(1).

A Copy,

Teste:

s\ David B. Beach
Clerk

IN THE

Supreme Court of Virginia

at Richmond

RECORD NO. 951908
RECORD NO. 951909
RECORD NO. 951910

CHARLES M. ANDERSON, pro se
GEORGE J. VIERTEL, Esq., pro se
MITSUKO ANDERSON, by counsel

Appellants,

v.

DINESH C. SHARMA, by counsel
RUSHIMI D. SHARMA, by counsel,

Appellees.

PETITION FOR REHEARING

COME NOW Appellants and Petition this Honorable Court under Supreme Court Rule 5:20 for Rehearing of its November 20, 1995 dismissal of their appeal petitions under Rule 5:17(a)(1) and in support thereof, state as follows.

1. Appellants' three appeal petitions were filed by U.S. Mail on October 24, 1995 under Rule 5:5(b). On October 30, 1995 Appellants received Chief Deputy Clerk Krueger's October 27, 1995 letter requesting that they send her a copy of their certified mailing of their appeals. This request was addressed in Appellant Charles M. Anderson's October 30, 1995 letter to Ms. Krueger (copy attached) enclosing the original U.S. Post Office Certificate of Mailing dated one day before the 90-day limit. The appeals were dismissed on November 20, 1995.

2. The assignments of error on appeal are substantial and meritorious and of a most serious character reflecting on multiple court errors in fact and law which are clearly determinative of the issues. Dismissal of these appeals under these circumstances constitutes wrongful denial of due process under the V and XV Amendments of the U.S. Constitution.

3. Appellants substantially complied with the requirements of filing by mail under Rule 5:5(b) which does not dictate strict compliance with only certified or registered mail to the exclusion of other types of mailing accompanied by U.S. Post Office dated certification which provides the same proof, i.e., what was mailed, sender, addressee, and date of mailing. The Certificate of Mailing used on October 24, 1995 is promoted by the U.S. Post Office as acceptable evidence of those four proofs. Kindly note that the Certification indicates "Chas, Mitsuko, George" which corresponds with the

contents of the package mailed, viz., three appeal petitions under the same three names. Thus the purpose of Rule 5:5(b) has been complied with, i.e., there is clear proof as to October 24, 1995 filing just as if certified mail had been used. It is also noted that Rule 5:5(a) clearly states that the requirements therein for time of filing "are mandatory," while no such indication appears in Rule 5:5(b) for filing procedure by mail. Note that this interpretation of Rule 5:5(b) is confirmed by this Honorable Court's November 20, 1995 order of dismissal by their stating, ". . .in the manner provided by law,. . ." (emphasis added), i.e., the method provided is not prescribed. Thus Appellants have proved their mailing on October 24, 1995 in such a manner that it should be accepted as October 24, 1995 filing.

4. Justice, equity, and fairness would dictate that the appeals (coming out of a chancery court) should be received considering the nature of the assignments of error raised, the law and, facts presented, and the clear record of trial court opinion directly in conflict with the transcript record. "In the furtherance of the ends of justice" is always a consideration in law and has been incorporated into the Supreme Court Rules, viz., Rule 1:8.

WHEREFORE having so stated, Appellants respectfully request this Honorable Court accept said appeals as properly filed and reverse their November 20, 1995 order.

Respectfully submitted,

s\ Charles M. Anderson
Charles M. Anderson
Appellant Pro Se
(703) 643-2193

s\ George J. Viertel
George J. Viertel, Esq.
Appellant Pro Se

Mitsuko Anderson
Appellant by Counsel

s\ George J. Viertel
George J. Viertel, Esq.
Counsel to Appellant
Mitsuko Anderson
Suite 105
9525 Georgia Ave.
Silver Spring, Md 20910
Virginia Bar No. 4371
(301) 589-7060

I MAILED a copy of the above to Douglass Mackall, Esq. at 4031 Chain Bridge Road, Fairfax, Virginia 22030 on November 28, 1995.

s\ Charles M. Anderson
Charles M. Anderson

s\ George J. Viertel
George J. Viertel, Esq.

Encl: copy of CMA 10/30/95 ltr to PK

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 19th *day of* January, 1996.

Charles M. Anderson, Appellant,

against Record No. 951908
Circuit Court No. CH125374

Dinesh C. Sharma, et al., Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 20th day of November, 1995 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

s\ David B. Beach
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 19th *day of* January, 1996.

George J. Viertel, Appellant,

against Record No. 951909
Circuit Court No. CH125374

Dinesh C. Sharma, et al., Appellees.

Mitsuko Anderson, Appellant,

against Record No. 951910
Circuit Court No. CH125374

Dinesh C. Sharma, et al., Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgments rendered herein on the 20th day of November, 1995 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

s\ David B. Beach
Clerk